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80 - 6732

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORVILLE GENE VINSON,
Petitioner,

v. No. _____

ROBERT R. RAINES, Warden,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN FORMA PAUPERIS

Submitted by:
Orville Gene Vinson, pro se
Box B-28054
Florence, Ariz. 85232

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ORVILLE GENE VINSON,
Petitioner,

v.

ROBERT R. RAINES, Warden,
Respondent,

Cause No. _____

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Orville Gene Vinson, pro se, who is now held in the Arizona State Prison, asks leave to file the attached petition for writ of certiorari tothe United States Court of Appeals for the Ninth Circuit in forma pauperis, pursuant to 28 U.S.C. 1915, without first being required to pre-pay fees and costs or otherwise being required to security therefore. In support of this motion, petitioner has attached his Affidavit of Poverty hereto.

Petitioner avers that he had been adjudged a pauper at all State Court proceedings in the above entitled matter.

Although petitioner paid the five dollar ($5.00) filing fee on his subsequent Application for Writ of Habeas Corpus under 28 U.S.C. 2254, he avers that he was, and still is, a pauper under 28 U.S.C. 1915. On September 30, 1980, the U. S. District Court, District of Arizona, summarily dismissed the Application and made no finding as to petitioner's status as a pauper. (Copy of September 30, 1980, ORDER OF DISMISSAL is attached hereto and marked as Exxhibits D-1 through D-5).

Petitioner appealed the District Court's DISMISSAL to the 9th Circuit Court of Appeals and asked them to issue a Certificate of Probable Cause. Included among the papers was a Motion for Leave to Appeal in Forma Pauperis and its supporting Affidavit. On December 23, 1980, the Court of Appeals denied the Certificate of Probable Cause and ruled that the Motion For Leave To Appeal In Forma Pauperis is therefore moot. (Copy of Court's December 23, 1980, ORDER is attached hereto and marked as Exxhibit F.)

Respectfully submitted by,

Orville Gene Vinson

Orville Gene Vinson

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UNITED STATES OF AMERICA
STATE OF ARIZONA
COUNTY OF PINAL

ss. AFFIDAVIT

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Having appeared before me in person, and having been first duly sworn, ORVILLE GENE VINSON deposed and said:

1) that he is the petitioner in the attached Petition For Writ Of Certiorari and its attending papers,

2) that he has read those papers and knows the contents thereof,

3) that the facts and information therein are true and correct to the best of his knowledge,

4) that he feels he has a good and just cause of action against the named respondent,

5) that because of his poverty he is unable to pay fees and costs of said cause or give security therefore,

that for the above reasons petitioner requests that he be permitted to proceed in forma pauperis.

Gene Vinson
Orville Gene Vinson, pro se
Box B-28054
Florence, Ariz. 85232

Subscribed and sworn to before me this 22nd day of May 1981.

Carson A. McWilliams
NOTARY PUBLIC

My Commission Expires April 15, 1984

STATEMENT BY PRISON OFFICIAL OF FUNDS ON DEPOSIT IN PETITIONER'S ACCOUNT.

The above named affiant, Orville Gene Vinson, has $.60 on deposite in his personal account at this institution.

Carson A. McWilliams C.P.II
Signature and title.

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IN THE SUPREME COURT OF THE UNITED STATES
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ORVILLE GENE VINSON,
Petitioner,

v. No. _____

ROBERT R. RAINES, Warden,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTION

Petitioner, Orville Gene Vinson, is a State prisoner at the Arizona Penitentiary. He filed an Application for Writ of Habeas Corpus under 28 U.S.C. 2254 in the U. S. District Court, District of Arizona, Phoenix, Ariz. The District Court dismissed the Application without an evidentiary hearing pursuant to Rule 4 of the Rules of Habeas Corpus 28 U.S.C. 2254. (Copy of DISMISSAL attached hereto and marked as Exhibits D-1 through D-5) The 9th Circuit Court Of Appeals subsequently denied a request for Certificate of Probable Cause, (Copy of ORDER of denial attached hereto and marked as Exhibit F) and on February 23, 1981, denied a MOTION FOR REHEARING of its prior ORDER. (Copy of February 23, 1981, ORDER attached hereto and marked as Exhibit G).

The jurisdiction of this Supreme Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORVILLE GENE VINSON,
Petitioner,

v. Cause No. _____

ROBERT R. RAINES, Warden,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPPEALS FOR THE NINTH CIRCUIT

QUESTIONS PRESENTED.

1) Was there a violation of petitioner's Fifth Amendment Rights under the U. S. Constitution where his statements after arrest were obtained from him while he was in a "blacked out state" brought on by drinking alcoholic liquors and by the effects of a plate placed in his skull to repair a head injury?

2) Was there a violation of petitioner's right to "due process of law" under the Fifth and Fourteenth Amendments to the U. S. Constitution when a jury instruction reduced the State's burden to prove specific intent and thereby allowed the jury to convict by a standard less than, "guilt beyond a reasonable doubt?

3) Was there a violation of petitioner's right to "due process of law" under the Fourteenth Amendment to the U. S. Constitution when the trial court permitted the uncorroborated testimony of an accomplice to go to the jury even though such a procedure is prohibited by State Statute A.R.S. 13-136?

4) Was there a violation of petitioner's right to "due process of law" under the Fourteenth Amendment to the U. S. Constitution when the trial court refused petitioner's request for a jury instruction on the definition of "reasonable doubt?"

5) Was there a violation of petitioner's right to "due process of law" under the Fifth and Fourteenth Amendments to the U. S. Constitution when the Arizona Court of Appeals used an unconstitutional standard of sufficiency of evidence to uphold petitioner's conviction?

Statement Of The Case.

(RT, page _____, refers to the REPORTER'S TRANSCRIPT OF PROCEEDINGS, Volumes I and II)

(SUPP, page _____, refers to the SUPPLEMENTAL TRANSCRIPT of March 16, 1976)

On November 22, 1975, between 4:15 P.M. and 7:40 P.M., five Phoenix area convenience markets were robbed by 2 young men armed with a sawed-off shotgun. At about 7:45 P.M., police stopped a pickup truck similar to witnesses' discriptions of the get-away vehicle.

Four men emerged from the cab of the truck, petitioner and Gary Amy exited from the driver's side while Patrick Chandler and Mike Marley exited from the passenger's side. (RT, pages 142 to 145) Chandler and Marley appeared to be emptying their pockets as they emerged. All were immediately arrested and searched.

Chandler and Marley were found to have considerable money in their pockets or scattered near their persons. (RT, page 163) Some of this money was subsequently identified as "bait money" stolen from some of the 5 stores. (RT, page 163) "Bait money" is a bill whose serial number is pre-recorded by a store and deliberately included with any money given to a robber. (RT, pages 68, 69) More money was found under the seat of the truck, on the floor board and on the ground just outside the truck, all of the above on the passenger side of the truck. (RT, pages 189, 190, 191, 198 199) A loaded, sawed-off shotgun was also found under the passenger's side of the seat. (RT, page 191) It was established that Chandler owned the gun. (RT, pages 285 and 307).

No stolen money or other evidence of the crimes in question was found on the driver's side of the vehicle or on petitioner's person. (RT, pages 163, 198, 199, 330).

A few minutes later all 4 men were returned to the site of the last robbery. Witnesses there, and also from the 4 other robbed markets, subsequently identified Chandler and Marley as the robbers. Pictures from hold-up cameras in some of those stores showed either Chandler or Marley pointing the sawed-off shotgun at the clerks. (RT, pages 70, 71) None of the witnesses identified petitioner

as a robber, (RT, pages 49, 80) nor is he shown in any of the hold-up pictures. All 4 men were than taken to jail. Later trial testimony by various police officers, showed that at the time of petitioner's arrest, he had the odor of alcohol about him, (RT, pages 216, 245) that his face was flushed (RT, page 216, also SUPP, page 16) and his clothse were in disarray. (RT, page 245, also SUPP, page 22) Upon arrest, when read his Miranda Rights, petitioner did not acknowledge any comprehension of those rights. (RT, pages 207, 208) Over an hour later, he could only nod assent to understanding his rights. When interrogated by police at the Criminal Investigations Bureau, petitioner acknowledged that he understood his rights. When asked if he would voluntarily waive those rights and submit to questioning, petitioner answered, "That's debatable." (RT, page 206) The police continued with their interrogation and in the process of being questioned, petitioner explained that he was driving around with the other suspects all afternoon but that he knew nothing about the commission of any robberies. (RT, pages 204, 261).

On the day after the arrest, November 23, 1975, Chandler placed a telephone call to petitioner's wife, telling her that petitioner was not involved in the robberies. (SUPP, page 50)

A few days later Amy, Chandler and Marley were released from jail either on bond or on their own recognizance. Petitioner was denied bail and remained in jail untill his trial.

Marley disapperaed shortly after being released from jail and has never shown up for trial.

Amy also disappeared but surfaced just before the start of petitioner's trial. (SUPP, page 7) He was subpoenaed as a defense witnesses but claimed his 5th Amendment right against self incrimination. (SUPP, pages 6, 7, 8, 9, 10) The Court stopped all further questioning of Amy. (SUPP, page 10) The State would not grant immunity. The day after petitioner was convicted, the State dismissed all charges against Amy and he was freed.

Chandler also fled. His attorney located him in Ohio on the day petitioner's trial started. Chandler was persuaded to return to Arizona and accept a plea agreement offered by the State. In exchange for testifying against petitioner, the State agreed to reduce the charges against Chandler from robbery with a gun, to robbery without a gun. (RT, page 294) This was in the face of eye witness testimony and hold-up photos showing Chandler pointing the shotgun at victims.

Chandler eventually pled guilty to the amended charges and received 6 months in jail followed by 5 years probation. Petitioner received 40 to 60 years for robbery "with a gun" although none of the victims identified him as a robber.

At petitioner's trial he stated that he was in a blackout at the time of the robberies and had no memory of them or his arrest. Other witnesses testified that petitioner does have blackouts, (SUPP, page 30, also RT, pages 220, 227, 228, 229), that the blackouts apparently began in 1969, after Doctor George T. Hoffman, a neurosurgeon, replaced part of petitioner's skull with man made materials, (SUPP, pages 54, 55, 56), that such blackouts may be triggered by his drinking alcoholic beverages but such blackouts would persist even without further drinking, that during such blackouts petitioner appears to1 function near normal in that: he can hold a normal conversation, he can drive a truck, he can play pool, (RT, pages 229, 230, 231, 232, 233), but after petitioner recovers from a blackout he has no memory of his actions during that period. (RT, pages 230. 231) In the present case, petitioner stated that he had been drinking earlier in the day but has no memory of the robberies or the arrest.

Chandler also testified at petitioner's trial and stated that he was petitioner's nephew, (RT, page 274) that on the morning of November 22, 1975, he looked for, and found, petitioner at a drinking party and asked him to leave the party in order to drive around Phoenix and try to sell some semi-precious rocks Chandler had placed in the bed of petitioner's truck. (RT, page 281). Chandler also said that, at the time, he was carrying the sawed off shotgun. (RT, page 308) Apparently it's a small gun, the prosecutor even commented on its concealability. (RT, page 38). There is no testimony that petitioner knew of or saw the shotgun until the police stopped the truck after the robberies. Chandler also testified that of the 5 robberies, he could only remember the 1st and 4th ones, he had no memories of the 2nd, 3rd and 5th robberies because he was, "wasted on drugs, marijuana and booze." (RT, pages 298, 299, 300, 304, 305).

After the trial, petitioner was convicted of robbery with a gun and was sentenced to 40 to 60 years in prison. He filed a timely appeal to the Arizona Court of Appeals, alleging 11 trial errors. His conviction was affirmed on April 26, 1977, by MEMORANDUM DECISION No. 1 CA-CR 1991. (Copy of which is attached hereto and marked as Exhibits A-1 through A-9)

On June 29, 1977, the Arizona Supreme Court DENIED REVIEW of the Appellate

Court's MEMORANDUM DECISION. (Copy of DENIAL is attached hereto and marked as Exhibit B)

On September 9, 1977, the Arizona Supreme Court DENIED a Motion For Finding Of Fact And Conclusions. (Copy of this DENIEAL is attached hereto and marked as Exhibit C)

On June 2, 1980, petitioner filed an Application For Writ Of Habeas Corpus under 28 U.S.C. 2254, in the U. S. District Court in Phoenix, Arizona. It became case number CIV 80-495 PHX WEC.

On September 30, 1980, the District Court DISMISSED the application without a hearing. (Copy of ORDER OF DISMISSAL and JUDGMENT attached hereto and marked as Exhibits D-1 through D-5)

In November 1980, petitioner appealed the District Court's DISMISSAL and asked for a Certificate of Probable Cause. The Court denied the application. (Copy of Court's ORDER attached hereto and marked as Exhibit E).

Petitioner made timely application to the 9th Circuit Court of Appeals for a Certificate Of Probable Cause. The Application and its attending Motions were denied without a hearing on December 23, 1980. (Copy of ORDER attached hereto and marked as Exhibit F.)

Petitioner made timely Motion For Rehearing of the Court's December 23, 1980, ORDER but was denied on February 23, 1981. (Copy of this ORDER attached hereto and marked as Exhibit G).

Question answered.

Petitioner's Fifth Amendment rights under the United States Constitution were violated when his statements after arrest were obtained from him while he was in a "blacked out state" brought on by his drinking alcoholic liquors and by the effects of a plate imbeded in his skull to repair a head injury.

Arguments.

On November 22, 1975, between 4:15 P.M. and 7:40 P.M., five Phoenix area convenience markets were robbed by 2 young men armed with a sawed off shotgun. Five minutes after the last robbery, police stopped a truck similar to witnesses discription of the get-away vehicle. Petitioner was found in the truck which was subsequently established as his.

Although petitioner was charged with the 5 robberies, the State did not allege that he personally robbed the stores, in fact, none of the victims identified him as the robber. Instead, he was implicated by the actual robber's statement that petitioner drove the get-away truck.

Shortly after petitioner's arrest, he allegedly made a statement that he had been in his truck all afternoon but did not remember any robberies. An evidentiary hearing was held to determine the voluntariness of this statement. At this hearing it was established that when petitioner was first read his Miranda rights, he did not acknowledge any comprehension of them. When re--read to him an hour later, he could only nod his head but subsequently acknowledged his comprehension of them. Several Phoenix police officers also testified that shortly after petitioner's arrest, his face was flushed, his clothse were in disarray and he had the odor of alcohol about him. No test for intoxication was made. The officers determined that petitioner was sober because he was able to walk and talk reasonably well.

Other witnesses testified that petitioner suffers from "blackouts" during which he appears to act near normal in that he can hold a reasonable conversation, drive a truck and play a fair game of pool, but that he never has any memory or those "blacked out periods" when he recovers.

Petitioner's own testimony was that he had been drinking heavily earlier in the day, that his nephew (the actual robber) asked him for help to sell some semi-precious rocks which were in the bed of petitioner's truck, that petitioner drove the truck that afternoon but does not remember where he went or what happened, that he doesn't remember any robberies or even his arrest, his subsequent questioning, nor does he remember hearing any Miranda warnings.

The Court heard this considerable "blackout" testimony and also became aware of a pervious operation on petitioner's skull during which a part of the bone was replaced with a plate. But the Court disregarded it and ruled the statements were admissable because of the police officer's testimony that petitioner did not appear drink and seemed to understand what was happening and was rational.

The voluntariness of petitioner's statement was raised on appeal both on the intoxication question and the "blackout" question, but the Appelate Court considered only the intoxication question. The "blackout" question was ignored by the Appelate Court even though under Arizona Statute a person in a "blacked out state" is not responsible for his actions. Arizona Revised Statute 13-134 says in part:

> A.R.S. 13-134. Certain persons not punished for acts or omissions
>
> The following persons shall not be punished for their acts or omissions:
> 1. Those who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.
> 2. Those who committed the act charged without being conscious thereof.
> 3. Those who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention or culpable neglignece.
> 4. Married persons, except for felonies, acting under threats, command or coercion of their spouses.
> 5. Those, unless the crime is punishable with death, who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to, and did believe their lives would be endangered if they refused. As amended Laws 1973, Ch. 172, Sec. 30.

The Appelate Court ruled taht, "The policemen who testified at the hearing supplied evidence which supports the trial court's determination that the statements were voluntary; we hold that they were properly admitted."

The Arizona Supreme Court denied Review.

The question of petitioner's statements after arrest, as set out above, became Ground One of his current Application For Habeas Corpus Under 28 U.S.C. 2254. The U. S. District dismissed the Application without an evidentiary hearing but made a brief written finding, "that the issue of petitioner's 'blackouts' is not separable from the issue of intoxication."

It is submitted that the District Court was in error for not holding an independant evidentiary hearing to determine:

a) if medically and legally, blackouts and intoxication are separate and distinct,

b) if the record warrants a finding that petitioner was in a "blacked out condition",

c) if he was in such a state, were his subsequent statements voluntarilly and intelligentlyt made.

Question answered.

Petitioner's right to "due process of law" under the Fifth and Fourteenth Amendments to the United States Constitution were violated when a jury instruction on intoxication reduced the State's burden to prove specific intent and thereby allowed the jury to convict by a standard less than, "guilt beyond a reasonable doubt."

Arguments.

At petitioner's trial, the jury was instructed that the State must prove intent to (1) commit the crime of robbery, and (2) take property from a victim permanently. This instruction correctly requires that there be a finding by the jury of specific intent of the accused to commit a crime. The court than instructed that intoxication could be considered by the jury to determine whether the accused could intend to commit the crime of robbery and take property from a victim permanently. This instruction is found on page 398 of the Reporter's Transcript Of proceedings in petitioner's case and is quoted below:

> An act done by an intoxicated person may still be a crime. However, for the crime of robbery, the State must prove intent to (1) commit the crime of robbery, and (2) take property from a victim permanently. You may consider the fact that he was intoxicated at the time in determining whether the defendant could intend to (1) commit the crime of robbery and (2) take property from a victim permanently.
> (Underlining added for emphasis.)

The above instructions are in direct conflict with another instruction that "The State does not have to prove that the defendant knew the act was forbidden by law." This instruction is found on page 397 of the Reporter's Transcript of Proceedings in petitioner's case and is quoted below:

> The State must prove that the defendant has done an act which is forbidden by law and that he intended to do it. You may determine that the defendant intended to do the act if he did it voluntarily. The State does not have to prove that the defendant knew the act was forbidden by law.

The accused cannot formulate intent to commit a crime without knowledge that his acts are forbidden by law. This instruction obscures the requirement that the jury must find that the petitioner specifically intended to (1) commit the crime of robbery and (2) take property from the victim permanently. These instructions allowed the jury to infer the guilt of appellant from commission of an act itself without following the specific intent portion of the instructions.

Furthermore, when this instruction removed from the jury the requirement to find "intent to commit a crime", it also removed from the jury"s consideration the effect of the "blackout" on the ability of the petitioner to formulate intent. The jury was instructed that "blackouts" and intoxication, went only to consideration

of whether petitioner could intend to (1) commit the crime of robbery and (2) take property from a victim permanently.

The conflict in the court's instructions on intent enabled the jury to ignore the requirement that petitioner must have an intent to commit a crime and allowed the jury to convict him without finding the necessary Mens rea.

The Arizona Court of Appeals ruled that the instructions must be read as a whole and that the instructions as given were adequate.

The Arizona Supreme Court denied Review.

The issue of jury instructions, as set out above, became Ground Two of petitioner's Application For Writ Of Habeas Corpus Under 28 U.S.C. 2254.

The U. S. District Court dismissed the Application without an evidentiary hearing but made a brief writen finding that: "Jury instructions are to be considered as a whole. Cupp v. Naughton, 414 U.S. 141 (1973). The Court has reviewed the trial court's instructions as a whole and finds that the trial court adequately instructed the jury on the elements of the case.

It is respectfully submitted that the District Court was in error when it found that the jury instructions must be considered as a whole ant that individual instructions may not be isolated for consideration of constitutionality. It has been held in Cool v. United States, 409 U.S. 100, 93 S.Ct. 354 (1972) that an erroneous instruction, by itself, may rise to the level of Constitutional error.

It is submitted that the jury instructions, as given in petitioner's case, deprived him of due process of law under the 5th and 14th Amendments.

Question answered.

Petitioner's right to "due process of law" under the Fourteenth Amendment to the United States Constitution was violated when the trial court permitted the uncorroborated testimony of an accomplice to go to the jury even though such a procedure is prohibited by the State Statute, A.R.S. 13-136.

Arguments.

At the time of petitioner's trial, Arizona law required corroboration of an accomplice's testimony before it could be submitted to the jury. The Statute isn question is:

A.R.S. 13-136. Accomplice; testimony and corroboration.

A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which, in itself and without the

aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

The trial court was aware of the requirements of this Statute, it was pointed out by petitioner's attorney. But the trial court ignored it and permitted the uncorroborated testimony of accomplice Chandler to go to the jury.

Hold-up cameras and numerous witnesses identified Chandler, and a second man named Marley, as the robbers of 5 convenience markets on November 22, 1975. Chandler admitted robbing markets 1 and 4 but doesn't remember the 2, 3, and 5 robberies because he was "wiped out on drugs, marijuana and booze."

Since the question of Chandler's guilt was clear,it was fundamental error for the court to let the jury decide if he was an accomplice. In addition, the trial court's failure to abide by A.R.S. 13-136, and require corroboration of Chandler's testimony was error because Chandler's testimony was unreliable due to his admitted faulty memory. The trial court's claim that Chandler wasn't an accomplice by law was subtrafuge to have his otherwise inadmissable testimony produced in court. Appellant's failure to ask for a jury instruction regarding Chandler's testimony was based solely on that court's flouting of A.R.S. 13-136.

The issue of Chandler's testifying was raised on appeal but the Appellate Court found that Chandler's testimony was admissable because there was ample testimony corroborating it in that, he testified that petitioner was driving the truck, that petitioner admitted being in the truck and that money was visible on the floor of the truck cab. It should be pointed out that there was no evidence admitted into the record to show that the money was on the floor prior to the trucks being stopped by the police. There was evidence to show that Chandler and Marley, the other robber, were actively emptying their pockets of money after the truck had been stopped.

The Arizona Supreme Court denied Review.

The trial court's flouting of the requirements of A.R.S. 13-136, as set out above, became Ground Four of petitioner's Application For Writ Of Habeas Courpus Under 28 U.S.C. 2254. The U. S. District Court dismissed the Application without an evidentiary hearing but made a written finding that, "There was ample evidence adduced at trial corroborating Chandler's testimony, and that the trial court's error did not affect the entire trial so as to deny petitioner Due Process."

It is submitted that the District Court was in error because it failed to rule on the State Court's disobedience of State Law as set out in petitioner's Application For Writ Of Habeas Corpus, but instead, merely supported the State

Court's finding that Chandler's testimony was admissable because it was sufficiently corroborated. A common sense reading of this alleged corroboration shows it to be spurous and not complying with the requirements of A.R.S. 13-136.

It is submitted that the District Court was in error for not holding an independent evidantiary hearing as required by 28 U.S.C. 2254(d).

Question answered.

Petitioner's right to "due process of law" under the Fourteenth Amendment to the United States Constitution was violated when the trial court refused petitioner's request for a jury instruction on the definition of "reasonable doubt."

Arguments.

At petitioner's trial, the jury received two instructions on reasonable doubt. The instructions are found on pages 396, 397 of the Reporter's Transcript Of Proceedings in petitioner's case and are quoted below:

> The State has charged the defendant with the crime of robbery. The charge is not evidence against the defendant. You must not think the defendant is guilty just because he has been charged with a crime. The defendant has pled 'not guilty.' The defendant's plea of 'not guilty means that the State must prove every part of the charge beyond a reasonable doubt.
>
> The State must prove the defendant guilty beyond a reasonable doubt.

Petitioner objected to the lack of a definition fro "reasonable doubt." But the Court would not amplify the jury instructions on reasonable doubt.

The Arizona Court of Appeals held that, "the failure to define the term "reasonable doubt" was not error, even where defendant had timely offered such an instruction. State v. Canedo, (2 CA-CR 858, filed March 1, 1977).

The Arizona Supreme Court denied Review.

The issue of reasonable doubt, as set out above, became Ground Five of Petitioner's Application For Writ Of Habeas Corpus Under 28 U.S.C. 2254. The District Court dismissed the Application without an evidentiary hearing but made a brief written finding that, "The failure to define 'reasonable doubt' has been held not to constitute reversable error in Arizona. State v. Canedo, 115 Ariz. 60, 563 P.2d 315 (Ct.App. 1977).

It is submitted that the confilicting jury instructions on "blackouts,"

and intoxication, in relation to petitioner's intent to commit the crime in question, and the failure to define "beyond a reasonable doubt," deprived petitioner of "due process of law" and a fair trial.

Question answered.

Petitioner's right to "due process of law" under the Fifth And Fourteenth Amendments to the United States Constitution was violated when the Arizona Court of Appeals used an unconstitutional standard of sufficiency of evidence to uphold petitioner's conviction.

Argements.

At the close of petitioner's trial, he moved for a directed verdict of acquital based on the insufficiency of the evidence presented. The motion was denied. The Arizona Court of Appeals upheld the trial court's ruling in this matter and cited the case of State v. Quatsling, 24 Ariz.App. 105, 536 P.2d 226 (1975), Cert.Den. 424 U.S. 954, as the standard for sufficiency of evidence. This decision said that only the slightest bit of additional evidence is needed for conviction of grand theft if a person possess recently stolen goods. Certiorari was denied on 4th Amendment grounds. The Quatsling case involved possession of recently stolen toold and the padlocks used to secure the buildings that housed those tools. The Court Of Appeals ruled that possession of the padlocks is the necessary additional evidence to prove that Quatsling stole the tools, even though both were taken at the same time.

In effect, this unconstitutional standard for sufficiency of evidence would allow petitioner's conviction to stand upon a finding that he was in the truck shortly after the robberies. Mere presence at the scene of a crime, without more, is insufficient for conviction of armed robbery. There must be a finding that petitioner knowingly aided or participated in the robberies.

The U. S. Supreme Court recently set a new standard for sufficiency of evidence needed to support a conviction. In Jackson v. Virginia, No, 78-5283 (June 28, 1979) the Court held:

1. A federal habeas corpus court must consider not whether there was any evidence to support a state-court action, but whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358.

The Arizona Court of Appeals was in error because it affirmed petitioner's conviction on the slightest bit of evidence standard set out in State v.

Quatsling, supra, which is far less than the Constitutional standard of, "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," as set out in In re Winship, 397 U.S. 358 at 364.

The issue of "sufficiency of evidence" as set out above, became Ground Six of petitioner's Application for Writ Of Habeas Corpus Under 28 U.S.C. 2254. The U. S. District Court dismissed the Application without an evidentiary hearing but made a brief finding that, "The Courtr has reviewed the record and finds that a reasonable trier of fact could be convinced by the evidence adduced at trial of the petitioner's guilt beyond a reasonable doubt."

Conclusion.

For all of the reasons previously stated herein it is respectfully requested that the Petition For Writ Of Certiorari be granted.

Respectfully submitted,

Orville Gene Vinson, pro se
Box B-28054
Florence, Ariz. 85232

DIVISION A
COURT OF APPEALS
STATE OF ARIZONA
FILED APR 26 1977
CLASSIE GANTT, CLERK
By

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ORVILLE GENE VINSON, Appellant.	1 CA-CR 1991 DEPARTMENT A MEMORANDUM DECISION (Not for Publication - Rule 48, Rules of the Arizona Supreme Court)

Appeal from the Superior Court of Maricopa County

Cause No. CR-90608

The Honorable Philip W. Marquardt, Judge

AFFIRMED

Bruce E. Babbitt, The Attorney General
by William J. Schafer III, Chief Counsel,
Criminal Division and
R. Wayne Ford
Assistant Attorneys General
Attorneys for Appellee — Phoenix, Arizona

Kenneth M. Arrick
Attorney for Appellant — Phoenix, Arizona

H A I R E, Judge

On this appeal, defendant raises eleven allegations of error because of which, he argues, his conviction of five counts of robbery while armed with a gun must be reversed.

The facts of the case, based on the evidence adduced at trial, concerned robberies of six convenience markets in

EXHIBITS—
A-1

Phoenix on November 22, 1975, between the hours of 4:15 p.m. and 7:40 p.m. Witnesses testified that all of these robberies were committed by two young men in their late teens, armed with a sawed-off shotgun, who fled by climbing into the bed of a pickup truck. At 7:45 p.m. police stopped a pickup truck, later identified as the "getaway" vehicle, in the vicinity of the robberies. Inside the cab of the truck were a sawed-off shotgun, identified at trial as the one used in the robberies, and coins and bills spread over the floor of the cab. Four men in the truck were arrested: the defendant, who, the police testified, was the driver; the defendant's nephew and another man, later identified as the two men who entered the markets and took the money; and one other man who was a friend of one of the suspects.

The police advised defendant of his MIRANDA rights when he was first apprehended after getting out of the vehicle; the warnings were repeated at the Criminal Investigation Bureau of Phoenix when defendant was questioned. When the officer at the Bureau asked defendant Vinson if he would voluntarily answer questions, Vinson's answer was "that's debatable", but he then proceeded to recount his version of the activities of the day, in which he stated that he had been with the other three suspects, driving and drinking all day, but that he had no knowledge of any robberies or of the presence of the gun and the money in the cab of the truck.

Defendant's nephew entered into a plea agreement with the state and testified at defendant's trial. According to his testimony, the robberies had been carried out on defendant's suggestion, in order to get money for defendant to make a payment on the pickup.

Although defendant did not testify at trial, defense counsel's argument to the jury was that defendant was so completely intoxicated during the time of the robberies that he had no knowledge of what was taking place and therefore lacked the necessary intent for the commission of the crime.

On this appeal, defendant raises the following allegations of error:

1. Defendant's statements. Defendant argues that his statements were involuntary and should not have been admitted at trial, because he was too intoxicated to be capable of exercising a choice, and because after he was given his MIRANDA warnings, the police continued to question him without an explicit waiver. A voluntariness hearing was held, at which the trial court concluded that the statements were given voluntarily, knowingly, and intelligently. Unless this determination was clear and manifest error, it will not be disturbed on appeal. STATE v. EDWARDS, 111 Ariz. 357, 529 P.2d 1174 (1974).

Answering questions after MIRANDA warnings have been given can constitute a waiver by conduct, STATE v. KNAPP, (Arizona Supreme Court No. 3106, filed March 9, 1977); STATE v. PINEDA, 110 Ariz. 342, 519 P.2d 41 (1974). This seems especially true where, as here, the statement given was self-serving and meant to be exculpatory. The extent of appellant's intoxication at the time of the giving of the statement was contested. Intoxication alone does not automatically preclude the admission of an accused's statements, unless the statements were so influenced by the intoxication as to be involuntary or untrustworthy. STATE v. MAGBY, 113 Ariz. 345, 554 P.2d 1272 (1976); STATE v. CLARK, 102 Ariz. 550, 434 P.2d 636 (1967).

A-3

The policemen who testified at the hearing supplied evidence which supports the trial court's determination that the statements were voluntary; we hold that they were properly admitted.

2. Corroboration of Testimony of an Accomplice. Appellant's next allegations of error concern the failure of the trial court to instruct the jury that his nephew, who testified against him, was an accomplice as a matter of law. STATE v. ANDERSON, 20 Ariz. App. 309, 512 P.2d 613, affirmed, mod. on other grounds, 110 Ariz. 238, 517 P.2d 508 (1973). This error, he continues, would have allowed the jury to find that the nephew was not an accomplice and so remove the necessity for independent corroboration of the nephew's testimony. A.R.S. § 13-136 (repealed, 1976).

Defendant made no objection to the court's instructions submitting this issue to the jury. This failure precludes its assignment as error on appeal, Rule 21.3(c), Ariz. R. Crim. Proc., STATE v. WHITAKER, 112 Ariz. 537, 544 P.2d 219 (1975), unless the error is such that we must consider it fundamental. Since there was ample evidence corroborating the nephew's testimony, in the testimony indicating that defendant was driving the truck, that the money was clearly visible on the floor of the cab, and in defendant's own statements, we hold that there was no fundamental prejudicial error in this failure to instruct the jury that the witness was an accomplice as a matter of law. STATE v. BLAZAK, ___Ariz.___, ___P.2d___ (Arizona Supreme Court No. 3099, filed January 20, 1977).

Appellant also argues that the court improperly instructed the jury on the degree of corroboration necessary to support a conviction. However, the instruction he now sets forth was not requested at trial, nor did he object to the instruction

given at trial on the grounds presently raised. Since the instruction given was taken verbatim from RAJI Crim. Standard 13, which correctly stated Arizona law then in force as being that the testimony of an accomplice must be corroborated, we can find no reversible error here.

Defendant also argues on this appeal that the evidence corroborating the accomplice's testimony was inadequate to support a conviction. The requirement of corroboration under A.R.S. § 13-136 is met when independent evidence tends to implicate the defendant to a "slight degree", STATE v. SPRINGER, 102 Ariz. 238, 428 P.2d 95 (1967) cert. denied, 390 U.S. 926. The corroborating evidence may be either direct or circumstantial. STATE v. SHELDON, 91 Ariz. 73, 369 P.2d 917 (1962).

While the appellant argues that he was "in no way connected to the commission of any crimes", the evidence was sufficient to allow the jury to conclude otherwise. Numerous witnesses to the various robberies described the robbers as running from the stores and climbing into the bed of a pickup to escape, with the truck being driven by a third person. The pickup in which defendant was apprehended was identified as the one used in the robberies. It was registered to appellant's wife, and defendant's own statement established that it was paid for, driven and possessed by himself. When the pickup was stopped shortly after the last robbery, the appellant, having been seated behind the steering wheel, got out of the vehicle. The floor of the vehicle was covered with money and a 4/10 shotgun, identified as the weapon used in the robberies, was discovered under the seat.

In appellant's statement he admitted that he had spent the entire day with Patrick Chandler, the accomplice who testified

at the trial and who was identified as having participated in all of the robberies. In addition, two other individuals who were with him were arrested; one of them was identified as having participated in the robberies with Pat Chandler. We find the accomplice's testimony to have been amply corroborated.

3. Instructions About Intent. Appellant complains that, while the instructions on the intent necessary for the crime of robbery and on the effect of intoxication were correct, considered alone, the instruction that the state did not have to prove that defendant knew the act was forbidden by law somehow removed from the jury the requirement expressed in these two instructions that it must find that defendant specifically intended to commit the crime of robbery. When the instructions are considered as a whole, however, the jury was adequately instructed both on the necessary intent and on the effect of intoxication on the ability to form such intent. The instructions must be read as a whole. Every instruction cannot possibly repeat the substance of every other instruction. We hold that the instructions given were adequate.

4. Reasonable Doubt. Defendant also contends that the trial court committed error in its failure to instruct the jury on the definition of reasonable doubt. Defense counsel did not tender any such instruction to the court, but did state, after the jury had been instructed, that he objected to the lack of a definition.

RAJI Crim. Standard 6 was given verbatim at the trial, in which the jury was instructed that the state was required to prove the defendant's guilt beyond a reasonable doubt. In its Comment to this instruction, the Arizona Supreme Court Committee on Uniform Jury Instructions explained that "evidence indicates

that efforts to enlighten the jury concerning the meaning of 'beyond a reasonable doubt' are ineffective."

Noting the Comment, which necessarily implies that failure to make such ineffective efforts cannot be considered error, Division 2 of this Court has recently held that the failure to define the term "reasonable doubt" was not error, even where defendant had timely offered such an instruction. STATE v. CANEDO (2 CA-CR 858, filed March 1, 1977).

5. Prosecutorial Comment on Defendant's Failure to Testify.

Appellant contends that the following statements, contained in the state's closing argument, were calculated to draw the jury's attention to the defendant's failure to testify:

> "While we are into that, Mr. Chandler [defendant's nephew, the accomplice] can almost be disregarded by you, if you want to. If you really feel so strongly that he was up there lying through his teeth about this whole thing, you can almost disregard Mr. Chandler's entire testimony and still convict Mr. Vinson on the evidence that is before you. The evidence in this case is uncontradicted. Mrs. Vinson didn't get on the witness stand and say she didn't see her husband drive that pickup. What you heard from the defendant is this. An admission to the police officers he had been driving that pickup all day long or that afternoon, he had been with his nephew who he probably thought at that time was going to stick up for him. That is about all you remember. He didn't even say in that admission he was not driving that pickup. Now you're being asked to speculate that no, he was not driving that pickup. You don't have that evidence before you." (Appellant's objection is to underlined portion).

Considered in context, these remarks by the prosecutor were made in reply to defendant's closing argument, and seem to be calculated to point out to the jury that the uncontradicted evidence showed that defendant was driving, that no one had testified on his behalf to substantiate the theory that he was

passed out in the pickup, as defendant's counsel had argued. Prosecutorial comment on the fact that certain evidence has not been contradicted is not improper. STATE v. ACOSTA, 101 Ariz. 127, 416 P.2d 560 (1966). The defendant's statement to the police in which he said he drove the vehicle were admissible, and this admission remained uncontroverted.

The comment as to Mrs. Vinson's failure to testify concerning the driving of the pickup was not a comment on the defendant's failure to testify. Under the circumstances of this case where Mrs. Vinson did testify concerning defendant's intoxication on the day in question, we cannot consider the prosecutor's comment concerning her testimony as a comment directly calculated to focus the jury's attention on defendant's failure to testify.

6. Insufficiency of the Evidence. Appellant's next allegation is that the evidence was insufficient to support the verdict in that the element of intent was not proved and the testimony of the accomplice was not adequately corroborated. The evidence previously discussed in this decision, which includes the accomplice's testimony, the defendant's own statement to police, and the police testimony that defendant was driving the truck with the money and the gun in its cab provides a more than sufficient basis for the jury's verdict, both as to corroboration and as to intent. STATE v. QUATSLING, 24 Ariz. App. 105, 536 P.2d 226 (1975), cert. denied 424 U.S. 945.

7. Circumstantial Evidence. Appellant next argues that we should reverse due to the court's instruction on the probative value of circumstantial evidence, which, appellant admits, followed present Arizona law as expressed in STATE v. GREEN, 111 Ariz. 444, 532 P.2d 506 (1975), (which followed STATE v. HARVILL, 106 Ariz. 386, 476 P.2d 841 (1970)). The Arizona Supreme Court

has addressed this issue; this Court is not the appropriate forum in which to seek a reconsideration of its decisions.

8. Denial of Speedy Trial. Appellant's last allegation is that he was denied a speedy trial in violation of the sixth amendment to the United States Constitution. Appellant was indicted on November 25, 1975. His arraignment occurred on December 1, 1975, but his trial did not occur until March 11, 1976. Appellant's contention on this appeal is not, however, that his right to speedy trial under Rule 8 of the Ariz. R. Crim. Proc. was violated; the period of time excludable as attributable to his motion to sever brings the trial date well within the ninety days allowed under this rule. STATE v. HOPPER, 25 Ariz. App. 65, 540 P.2d 1284 (1975); Ariz. R. Crim. Proc. Rule 8.4(a). Rather, appellant argues that because the case was not dismissed on March 1, 1976, the state was able to enter the plea agreement with the defendant's nephew which resulted in the damaging testimony. There is no indication in the record that the state was purposely delaying the trial in order to reach this agreement with the witness. Cf. BARKER v. WINGO, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). We do not feel that the short delay involved here and the type of prejudice to the defendant that is alleged can possibly be considered to constitute a violation of defendant's constitutional rights to a speedy trial as guaranteed in the sixth amendment to the United States Constitution so as to constitute grounds for reversal here.

Affirmed.

LEVI RAY HAIRE
JUDGE

CONCURRING:

GARY K. NELSON
PRESIDING JUDGE, DEPARTMENT A

FRANCIS J. DONOFRIO
JUDGE

CLIFFORD H. WARD
CLERK

Supreme Court

STATE OF ARIZONA
Phoenix
85007

CHIEF DEPUTY CLERK

June 29, 1977

STATE OF ARIZONA, Appellee, vs. ORVILLE GENE VINSON, Appellant.	Supreme Court No. 3953-PR Court of Appeals No. 1 CA-CR 1991 Maricopa County No. 90608

The following action was taken by the Supreme Court of the State of Arizona on June 28, 1977 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 29th day of June, 1977.

CLIFFORD H. WARD, Clerk
By Mary Ellen Hughes
Deputy Clerk

TO: Hon. Bruce E. Babbitt, Attorney General, 159 State Capitol Building, Phoenix, Arizona 85007 Attn: R. Wayne Ford
Kenneth M. Arrick, Esq., 35 West Jefferson, Phoenix, Arizona 85003
Charles F. Hyder, Maricopa County Attorney, 101 West Jefferson, Phoenix, Arizona 85003
Hon. Philip W. Marquardt, Judge, Maricopa County Superior Court, 101 West Jefferson, Phoenix, Arizona 85003
Glen D. Clark, Acting Clerk, Court of Appeals, Division One, West Wing, State Capitol Building, Phoenix, Arizona 85007

rs

WARD

Supreme Court

STATE OF ARIZONA
Phoenix
85007

MARY ANN HOPKINS
CHIEF DEPUTY CLERK

September 9, 1977

STATE OF ARIZONA,

Appellee,

vs.

ORVILLE GENE VINSON,

Appellant.

Supreme Court
No. 3953-PR

Court of Appeals
No. 1 CA-CR 1991

Maricopa County
No. 90608

The following action was taken by the Supreme Court of the State of Arizona on September 8, 1977 in regard to the above-entitled cause:

"ORDERED: Motion for Findings of Fact and Conclusions = DENIED."

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

TO: Kenneth M. Arrick, Esq., 35 West Jefferson Street, Phoenix, Arizona 85003
Hon. Bruce E. Babbitt, Attorney General, 159 State Capitol Building, Phoenix, Arizona 85007 Attn: R. Wayne Ford and Galen H. Wilkes
Orville Gene Vinson, Box B 28054, Arizona State Prison, Florence, Arizona 85232

FILED
SEP 30 1980
W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ORVILLE GENE VINSON
Petitioner,
v.
ROBERT RAINES
Respondent.

No. CIV 80-495 PHX WEC

ORDER OF DISMISSAL

The petitioner, an inmate of the Arizona State Prison, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C.§2254 to attack an armed robbery conviction. The petitioner appealed the conviction to the Arizona Court of Appeals. He was unsuccessful. The Supreme Court of Arizona denied review.

For the reasons that follow, the petition is dismissed without an evidentiary hearing pursuant to Rule 4 of the Rules for Habeas Corpus 28 U.S.C.§2254.

Petitioner challenges his conviction on a number of grounds. First, he alleges that his post-arrest statements to police were involuntary in that they were products of "automatism" or "blackouts". It is clear that the petitioner was drinking on the day of the robberies. An exhaustive evidentiary hearing was held on the issue of voluntariness. The Court has reviewed the transcript of the hearing and finds that the issue of the petitioner's "blackouts" is not separable from the issue of intoxication. The court thoroughly addressed the issue of intoxication as it affected the

the voluntariness of petitioner's statements, and the Court finds that the trier of fact could reasonably find his statements to be voluntary. The trial court's findings as to the admissibility of a confession are not to be disturbed absent clear and manifest error. State v. Edwards, 111 Ariz. 357, 529 P.2d 1174 (1974).

Second, petitioner attacks the instructions of the trial court. He first alleges that the court's instructions on intent permitted the jury to convict him if they believed he could have intended the robberies. Petitioner in this allegation has isolated one part of the court's instructions. The instruction reads:

> An act done by an intoxicated person may still be a crime. However, for the crime of robbery the State must prove intent to 1) commit the crime of robbery, and 2) take property from a victim permanently. You may consider the fact that he was intoxicated at the time in determining whether the defendant could intend to 1) commit the crime of robbery, and 2) take property from a victim permanently.

Jury instructions are to be considered as a whole. Cupp v. Naughton, 414 U.S. 141 (1973). The Court has reviewed the trial court's instructions as a whole and finds that the trial court adequately instructed the jury on the the elements of the case. He next alleges that the court's failure to give an instruction on the issue of "automatism" denied him Due Process. Petitioner's "blackouts" are not separable from the issue of intoxication, on which subject the trial court properly instructed the jury. Moreover, no such instruction was requested, and therefore under Arizona law, petitioner waived the point. Rule 21.3(c), Arizona Rules of Criminal Procedure. Next he alleges that the trial court's failure to define "reasonable doubt" was improper in that it

denied him Due Process under the holding of In Re Winship, 397 U.S. 358 (1970). Winship holds that the Due Process Clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime. It merely sets the "reasonable doubt" standard as the standard which must be met on all elements of a crime before a conviction can withstand Due Process scrutiny. The failure to define "reasonable doubt" has been held not to constitute reversible error in Arizona. State v. Canedo, 115 Ariz. 60, 563 P.2d 315 (Ct. App. 1977). A review of the instuctions given by the trial court discloses that the Court clearly and properly instructed the jury on the State's burden of proof. Lastly, petitioner alleges that the trial court's error in not instructing the jury that one Patrick Chandler was an accomplice as a matter of law whose testimony had to be corroborated denied him Due Process. Petitioner made no objection to the instruction the court did give, and waived any right to appeal the issue as a matter of Arizona law. Rule 21.3(c), Arizona Rules of Criminal Procedure. The Court finds that there was ample evidence adduced at trial corroborating Chandler's testimony, and that the trial court's error did not affect the entire trial so as to deny petitioner Due Process. Cupp, supra.

Third and lastly, petitioner alleges that the evidence at trial was not sufficient to convince a reasonable trier of fact of his guilt beyond a reasonable doubt. In challenging a state criminal conviction under 28 U.S.C.§2254, a petitioner is entitled to relief only if it is found that the record evidence could convince no reasonable trier of fact of his guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324 (1979). The Court has reviewed the record and finds that a reasonable trier of fact could be convinced by the evidence adduced at trial ot the petitioner's guilt

beyond a reasonable doubt.

For the foregoing reasons, the petition is dismissed pursuant to Rule 4, Rules for Habeas Corpus, 28 U.S.C. §2254.

IT IS SO ORDERED.

DATED this the 30th day of September, 1980 at Phoenix, Arizona.

Walter E. Craig
United States District Judge

D-4

JUDGMENT ON DECISION BY THE COURT

CIV 32 (7-68)

United States District Court

FOR THE

DISTRICT OF ARIZONA

CIVIL ACTION FILE NO. 80-495 Phx

ORVILLE GENE VINSON

vs.

ROBERT RAINES, Warden

JUDGMENT

This action came on for ~~trial~~ (hearing) before the Court, Honorable Walter E. Craig, United States District Judge, presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the petitioner take nothing and that the petition and action are dismissed.

FILED

SEP 30 1980

W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BY _____ DEPUTY CLERK

Dated at Phoenix, Arizona, this 30th day of September, 19 80.

W. J. FURSTENAU
Clerk of Court

By: Dorothy Ewart, Deputy Clerk

14

FILED

2 1980

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ORVILLE GENE VINSON Petitioner, v. ROBERT R. RAINES Respondent.	)	No. CIV 80-495 PHX WEC ORDER

The petitioner has filed a request for a certificate of probable cause and a request to proceed in forma pauperis to appeal the Court's order of September 30, 1980 dismissing petitioner's habeas corpus petition. Both requests are denied for the reason that no new circumstances have been raised in the requests that were not considered when the Court dismissed the petition. The appeal is frivolous and the requests are denied.

IT IS SO ORDERED.

DATED at Phoenix, Arizona this ___ day of November, 1980.

Walter E. Craig
United States District Judge

SST-10-78
SM-1235

- F -

(2)

FILED

DEC 23 1980

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ORVILLE GENE VINSON, Petitioner, vs. ROBERT RAINES, Respondent.	No. 80-8125 DC# CV 80-495 PHX WEC Arizona (Phoenix) ORDER

Before: GOODWIN and REINHARDT, Circuit Judges

Petitioner's application for a certificate of probable cause is denied. The motions for leave to proceed in forma pauperis, for the appointment of counsel, and for leave to proceed on typewritten papers are denied as moot.

CR CAL 12/15/80

FILED

FEB 23 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ORVILLE GENE VINSON, Petitioner, vs. ROBERT RAINES, Respondent.	No. 80-8125 DC# CV 80-495 PHX WEC Arizona (Phoenix) ORDER

Before: GOODWIN and REINHARDT, Circuit Judges

Petitioner's motion of January 28, 1981 for rehearing of the court's December 23, 1980 order denying his application for a certificate of probable cause is denied.

2/3/81 SP

(CR CAL 12/15/81)

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SUPREME COURT, U.S.

NO. 80-6732

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

ORIGINAL COPY

ORIVLLE GENE VINSON,

Petitioner,

-vs-

ROBERT RAINES,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

JACK ROBERTS
Assistant Attorney General
State Capitol Building
West Wing -- Second Floor
Phoenix, Arizona 85007

Attorneys for RESPONDENT

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61 L.Ed.2d 560 (1979) 14,15

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). Assuming, arguendo, that the Ninth Circuit's denial of a certificate of probable cause is tantamount to a "judgment" or "decree" within the meaning of that statute, respondent points out that petitioner does not ask for any form of relief. He asks merely that this Court grant the petition for certiorari.

STATEMENT OF THE CASE

Petitioner was arrested and charged with six counts of armed robbery stemming from a series of robberies committed in Phoenix between 4:00 and 8:00 p.m. on November 22, 1975. Shortly after the last robbery, police received a description of the suspect vehicle, a dark-colored pickup truck. Petitioner was driving the truck when police stopped him about 10 minutes after the last robbery. In addition, officers found money scattered on the floor of the truck, wads of bills in petitioner's pockets, and the .410 shotgun used in the robberies beneath the front seat.

In statements to the police, petitioner admitted that the truck was his, that he had picked up the individuals who actually committed the robberies, and had driven around with them all afternoon until they were stopped by the authorities. (R.T. of Vol II, at 200-04.) At trial, petitioner's defense was that he could not remember the robberies or the arrest because of an alleged "blackout" induced by heavy drinking. Pat Chandler, petitioner's nephew and one of the actual participants, testified that petitioner suggested the robberies to obtain money for a payment on petitioner's truck. (Id. at 283-86.) The state moved to dismiss one count, and petitioner was convicted of the five remaining counts. Petitioner was sentenced to a term of 40 to 60 years.

The judgment was affirmed on appeal. No. 1 CA-CR 1991 (Memorandum Decision, Apr. 26, 1977.) Rehearing was denied May 27, 1977. The Arizona Supreme Court denied review June 28, 1977. On July 14, 1977, petitioner filed a motion requesting the Arizona Supreme Court to provide findings of fact and conclusions of law in support of the denial of review. The supreme court denied that motion September 8, 1977.

Having exhausted his state remedies, petitioner instituted an action for a writ of federal habeas corpus. The district court denied relief September 30, 1980. Subsequently, the district court denied a certificate of probable cause, terming the appeal "frivolous." December 23, the Ninth Circuit denied petitioner's application for a certificate of probable cause. The Ninth Circuit denied petitioner's motion for rehearing February 23, 1981.

REASONS FOR DENYING THE WRIT

ARGUMENT

I

THE DISTRICT COURT FOUND NO REASON TO DISTURB THE TRIAL COURT'S RULING ON THE ISSUE OF VOLUNTARINESS; THE ISSUE OF INTOXICATION WAS INEXTRICABLY BOUND UP WITH THE ALLEGATION OF BLACKOUTS.

Petitioner claims that both the trial court and the Court of Appeals erred in finding that his statements to police were voluntary because petitioner allegedly suffered from "automatism" or episodic blackouts. According to petitioner, he could not remember the robberies, arrest, or the statements he made to police. In Arizona, voluntariness must be proven by a preponderance of the evidence, and the trial court's findings will not be disturbed absent clear and manifest error. State v.

Edwards, 111 Ariz. 357, 529 P.2d 1174 (1974). Under Arizona law, intoxication does not preclude the admission of statements unless the accused was so intoxicated that the statements should be considered involuntary or untrustworthy. State v. Magby, 113 Ariz. 345, 554 P.2d 1272 (1976); State v. Clark, 102 Ariz. 550, 434 P.2d 636 (1967). Voluntariness is to be determined by all the circumstances.

There is no question that petitioner had been drinking the day of the robberies. However, none of the officers who arrested and spoke with petitioner described him as intoxicated. To the contrary, they all testified that petitioner had good coordination, normal speech, and no problem walking. (R.T. of Vol. II, at 167, 200-05, 217, 246.) The especially critical testimony of Officer Tony Marks reveals that petitioner was quite aware of what he had been doing all afternoon. After Officer Marks gave petitioner Miranda warnings (approximately 1 hour after arrest), petitioner acknowledged them. (Id. at 203.) When Officer Marks asked whether petitioner would voluntarily speak with police, petitioner replied with the cleverly ambiguous phrase, "That's debateable [sic]." (Id. at 206.) Marks then asked petitioner to relate what had happened from the early afternoon hours of that day until police had arrested him. Petitioner had no difficulty recalling that he had picked up the three other individuals involved (Gary Amy, Michael Marley, and Patrick Chandler, petitioner's nephew) and had driven around in his pickup truck until arrested. (Id. at 204.) Thus, petitioner did not say that he could not remember what he had been doing during the time the robberies occurred -- he said that he had been driving around with three people until the police

stopped his truck. Any alleged "blackout" was surely selective, because the only thing petitioner could not remember was the robberies. Moreover, several other statements made to Officer Marks make it evident that petitioner never "blacked out." Although Marks informed petitioner of the charges, there is nothing in the record to indicate that Marks mentioned anything about money on the floor of the truck or the shotgun discovered beneath the front seat. Nonetheless, petitioner told Marks that he knew nothing about the robberies, the money or the gun found in the truck. If petitioner had been unaware of what was going on during the robberies, he would have known nothing about the money or the shotgun. Petitioner also told Officer Marks that the truck was his (although registered in his wife's name), and that he made payments on it. Interestingly, petitioner told Marks that he was poor and could not meet a payment due on the truck. (Id. at 204.) According to Patrick Chandler, lack of money to pay for the truck was the motive petitioner gave for suggesting the robberies. (Id. at 283-86.)

At the extensive voluntariness hearing, petitioner testified that he did not remember the robberies, the arrest, Miranda warnings, or questions from the police. (Id. at 209-14.) At the hearing, petitioner produced two witnesses who testified that petitioner, at times, seemed unable to recall what he had done during previous periods when he was drinking. At this point, respondent calls the Court's attention to the fact that neither petitioner nor any of his witnesses ever separated the question of blackouts from intoxication. There is not one shred of competent testimony to indicate that anything except heavy drinking caused these alleged blackouts. Petitioner now

seeks to create an artificial dichotomy between his drinking and the alleged blackouts -- a distinction never even suggested until petitioner filed for habeas corpus in the district court. Petitioner's testimony at the hearing and his assertions in the original petition are contradictory. Unequivocally, at the hearing, petitioner said he could not recall certain things because of his drinking. (Id. at 213.) The first ground discussed in the original petition reiterates the contention that alcohol caused his alleged blackout. At page q of the appendix to that petition, however, petitioner states: "Although petitioner is an alcoholic, this is not the cause of his blackouts." That statement completely contradicts petitioner's own testimony and that of his witnesses. The issue of blackouts was never raised at trial or on appeal except in conjunction with petitioner's drinking.

In addition, neither of petitioner's witnesses (Jerry Mangus and June Vinson, petitioner's ex-wife) saw petitioner in the afternoon on the day of the robberies, and could not testify with respect to his condition between 4:00 p.m. and 8:00 p.m., when the robberies took place. Moreover, Mr. Mangus' testimony shed no light on how anyone could discern when petitioner might be suffering an alleged blackout. Mangus testified that petitioner appeared quite normal, carried on conversations, and experienced no problem walking. (Id. at 228-29.) In view of Mangus' description of petitioner's apparently normal behavior, the prosecutor asked Mr. Mangus how he knew that petitioner would later not recall what he was doing at that moment. Mr. Mangus replied: "I can tell when nobody else can." (Id. at 230.) There was no medical testimony to substantiate petitioner's allegation of alcohol-related

lapses of memory. Furthermore, from a logical and legal point of view, petitioner's contention of blackouts would not negate the voluntariness of statements to the police or constitute a defense to the crimes charged. When petitioner states that he "blacked out," he is saying simply that he does not remember doing something. That, of course, is quite different from asserting that one was not conscious of what he was doing at the moment he was doing it. Consequently, petitioner's allegations of subsequent lapses of memory, even if accepted at face value, do not prove that he was unaware of prior actions at the moment he was engaged in them. Petitioner obviously cannot claim that he was physically unconscious when the robberies occurred because he admitted driving the truck all afternoon until arrested.

At trial -- not at the voluntariness hearing -- defense counsel attempted to adduce testimony about an alleged operation performed upon petitioner in 1969 by a neurosurgeon. Defense counsel had not subpoenaed the neurosurgeon and made no offer of expert testimony about the effects of such surgery. Since the jury would have had no expert testimony to explain possible effects of surgery, the trial court did not allow lay testimony on the subject. (Supplemental Transcript, at 54-55.) Having presented no medical evidence about this alleged operation, petitioner now attempts to blend the drinking with the operation and let this Court decide which might be responsible for his "involuntary" statements to the police. Even now petitioner cannot decide which point to press, as one may observe by comparing subsection 1 of page 1 of the original petition with page 1 of the appendix to the petition. Subsection 1 states that petitioner blacks

out while drinking. Subsection 3 alleges that petitioner had over 30 cans of beer shortly before the robberies (actually at least 4 hours before). At the bottom of that same page, however, petitioner states that the Arizona courts considered "the intoxication question only." Since petitioner had alleged that his memory lapses were the result of his drinking, there was no separable issue of alcoholic blackouts before the courts, and no competent evidence of any alleged surgery.

The federal standard for determining voluntariness of admissions is a preponderance of the evidence -- the same standard employed in Arizona. United States ex rel. Burbank v. Warden, Ill. State Penitentiary, 535 F.2d 361 (7th Cir. 1976). The Arizona courts found that the state had borne its burden upon the issue of voluntariness. Respondent respectfully submits that the testimony of four police officers about petitioner's appearance and actions (particularly the testimony of Officer Marks), coupled with the nature of petitioner's own statements (i.e., mention of the money and shotgun when Officer Marks had said nothing about them), unequivocally demonstrates that the state carried its burden. Admissibility of evidence is a matter of state law, and federal courts will not intervene unless the state court's ruling deprives the defendant of fundamental due process. Crisafi v. Oliver, 396 F.2d 293 (9th Cir.), cert. denied, 393 U.S. 889 (1968). Respondent submits that the district court was correct in ruling that there was no deprivation of due process in admitting petitioner's statements.

ARGUMENT

II

THE TRIAL COURT CLEARLY INSTRUCTED THE JURY THAT THE STATE HAD TO PROVE THAT PETITIONER INTENDED TO COMMIT ROBBERY.

Petitioner isolates one part of the jury instructions and asserts that it lessened the state's burden of proof. Jury instructions must be considered as a whole. Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); Young v. Wyrick, 451 F.Supp. 576 (W.D. Mo.), aff'd, 590 F.2d 40 (8th Cir. 1978). In addition to the instruction cited by petitioner, the trial court gave the following instructions:

> The law does not require a defendant to prove his innocence. He is presumed by law to be innocent. This means the state must prove all of its case against defendant.
>
> The State must prove the defendant guilty beyond a reasonable doubt.
>
> The State must prove that the defendant has done an act which is forbidden by law and that he intended to do it. . . .
>
> Robbery has four elements:
>
> 1. There must be a taking of personal property which is in the possession of the victim; and
>
> 2. The taking must be from the victim's person or his immediate presence; and
>
> 3. The taker must intend to take the property from the victim permanently; and
>
> 4. The taking must be against the victim's will by means of force or fear.
>
> The victim may be in fear when:
>
> (1) He fears physical injury to himself or his property; or (2) he fears immediate physical injury to the person or property of someone in his presence.
>
> An act done by an intoxicated person may still be a crime. However, for the

> crime of robbery the State must prove intent to (1) commit the crime of robbery, and (2) take property from a victim permanently. You may consider the fact that he was intoxicated at the time in determining whether the defendant could intend to (1) commit the crime of robbery and (2) take property from a victim permanently.

(R.T. of Vol. II, at 397-98; emphasis added.) It is clear that the trial court three times instructed the jury that the state had to prove intent to commit the offense. Respondent submits that the instructions, viewed as a whole, correctly informed the jury of the state's burden of proof with respect to the element of intent, and the district court so found.

ARGUMENT

III

> THE TRIAL COURT INSTRUCTED THE JURY THAT TESTIMONY OF AN ACCOMPLICE HAD TO BE CORROBORATED AND DEFENSE COUNSEL DID NOT OBJECT TO THE INSTRUCTIONS.

Petitioner is correct in his assertion that the trial court should have informed the jury that Patrick Chandler was an accomplice as a matter of law instead of submitting that question to the jury. The Court of Appeals acknowledged that the trial court erred in submitting the question of accomplice status to the jury, but noted that petitioner waived the issue by failing to object to that instruction. (Court of Appeals Opinion, at 4-5.) However, the trial court also gave the following instruction:

> You are not permitted to determine guilt based only on the statements of an accomplice. There must be other evidence indicating that the defendant committed the crime.

(R.T. of Vol. II, at 398.) Consequently, the trial court correctly informed the jury that corroboration other than the testimony of an accomplice was necessary to convict. (Arizona no longer requires corroboration of an

accomplice's testimony. Ariz.Rev.Stat.Ann. § 13-302.) Petitioner's voluntary admissions that he owned the truck and had been driving it all afternoon before the arrest constituted further corroboration. Several police officers testified that petitioner was the driver, that they found money all over the floorboard, wads of money in petitioner's pockets (although he told Officer Marks that he had no money to make the payment on his truck), and the .410 shotgun (a gift from petitioner to Patrick Chandler) under the front seat. (Id. at 179-85, 189-91, 204, 317-19.)

Finally, even if Chandler's testimony had been uncorroborated, that would not amount to a question of constitutional magnitude. Federal courts have long held that a conviction based on the uncorroborated testimony of an accomplice does not offend due process. Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917); United States v. DeLarosa, 450 F.2d 1057 (3d Cir. 1971), cert. denied, 405 U.S. 927 (1972); DeCarlo v. United States, 422 F.2d 237 (9th Cir. 1970); Perez v. Metz, 459 F.Supp. 1131 (S.D.N.Y. 1977).

ARGUMENT

IV

PETITIONER'S COUNSEL OFFERED NO DEFINITION OF "REASONABLE DOUBT," AND THE INSTRUCTIONS TO THE JURY, VIEWED AS A WHOLE, CORRECTLY INFORMED THE JURY ABOUT THE STATE'S BURDEN OF PROOF WITH RESPECT TO EVERY ELEMENT OF THE OFFENSE.

Although trial counsel for petitioner objected to lack of a definition of reasonable doubt, he offered no definition of the concept. (R.T. of Vol. II, at 400.) In affirming the conviction, the Arizona Court of Appeals

pointed out that the comment to the instruction the court gave concerning reasonable doubt noted the absence of a universally accepted definition and the futility of attempting to define the term. (Memorandum Decision of the Court of Appeals, at 6-7.) The Court of Appeals also noted that Division II of that court had held that failure to define "reasonable doubt" did not constitute reversible error. State v. Canedo, 115 Ariz. 60, 563 P.2d 315 (Ct.App. 1977). The trial court twice instructed the jury about the state's burden of proof and fully explained the elements the state had to prove. (R.T. of Vol. II, at 396-98.) In addition, the trial court gave a presumption of innocence instruction. (Id. at 397.)

Jury instructions must be considered in their totality. Cupp v. Naughten, supra. To find petitioner's argument persuasive, this Court would have to conclude that, even though the trial court twice properly instructed the jury about the state's burden to prove all elements beyond a reasonable doubt, the failure to further define the phrase (when defense counsel himself offered no definition) amounted to constitutional error. The further implicit assumption in petitioner's argument is that a jury cannot comprehend what "reasonable doubt" means without an elaborate explanation.

The case that held proof beyond a reasonable doubt to be constitutionally required did not define "reasonable doubt" or hold that any more detailed definition had to be given. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The explicit holding of this Court in Winship was "that the Due Process Clause protects the

accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (Id. at 364.) Thus, this Court was primarily concerned that the jury should be aware of all the elements and facts essential to conviction, and then apply the standard of reasonable doubt to those facts.

When one complains that an instruction was incomplete instead of erroneous, he bears a particularly heavy burden of demonstrating prejudice:

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process", Cupp v. Naughten, 414 U.S., at 147, 94 S.Ct., at 400, 38 L.Ed.2d 368, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" id., at 146, 94 S.Ct., at 400.
>
> In this case, the respondent's burden is especially heavy because no erroneous instruction was given; his claim of prejudice is based on the failure to give any explanation--beyond the reading of the statutory language itself--of the causation element. An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law.

Henderson v. Kibbe, 431 U.S. 145, 154-55, 97 S.Ct. 1730, 1736-37, 52 L.Ed.2d 203, 212-13 (1977) (emphasis added; footnote omitted). In Kibbe, this Court affirmed the conviction even though the trial court had not completely defined a causation element necessary to sustain a conviction of second degree murder. Considering all the instructions, this Court held that the issue of causation had been adequately raised, and that the jury had been

properly instructed about the state's burden of proof beyond a reasonable doubt with respect to all elements of the crime. There is no indication in the opinion that the trial court attempted to define "reasonable doubt."

Respondent submits that "reasonable doubt" is not a complex legalism requiring further definition. The jury may use their common sense. It is also significant that defense counsel in his closing argument repeatedly mentioned the burden of reasonable doubt in conjunction with the specific elements the state had to prove. (Id. at 371, 381.) Defense counsel, however, never offered a definition of reasonable doubt. Federal courts have consistently held that the failure to define terms that are not inherently recondite does not amount to constitutional error. Bryan v. Wainwright, 588 F.2d 1108 (5th Cir. 1979) (jury could understand concept of "depraved mind" without further instruction). On the contrary, the true danger arises when the court misstates the law. Cf. Dunn v. Perrin, 570 F.2d 21 (1st Cir.), cert. denied, 437 U.S. 910 (1978) (trial court gave three conflicting definitions of "reasonable doubt" and thereby shifted the burden of proof to the defendant). Respondent contends that the rationale of United States v. Lawson, 507 F.2d 433 (7th Cir.), cert. denied, 420 U.S. 1004 (1974), is persuasive:

> [W]e are of the opinion that the failure to give a defining instruction of "beyond a reasonable doubt," even though an acceptable instruction has been tendered, should not be the basis for reversing an otherwise fairly conducted trial. We also, of course, are assuming that the jury has been instructed that the prosecution must prove its case beyond a reasonable doubt and that the burden of doing so remains with the prosecution.

> We are here dealing with ordinary English words of common acceptance. "I doubt that" is a common expression. It is ordinary practice in negligence cases to instruct on the standard of care of a reasonable man. It would not seem to serve much purpose to resort to the antonym and define reasonable doubt as being doubt that was not unreasonable under the evidence. The phrase is not esoteric, such as res ipsa loquitur, nor is it confusingly similar to other more common words such as "proximate" or some of those employed in patent law.
>
> Because of the very commonness of the words, the straining for making the clear more clear has the trap of producing complexity and consequent confusion. . . .
>
> The essential aspect of the matter it appears to us is that the jury clearly understand that there must be proof persuasive beyond a reasonable doubt. Defining the term should be at the option of the trial judge even though a defining instruction is tendered. Lack of definition would not appear to be prejudicial.

507 F.2d at 441-42 (footnotes omitted). Respondent respectfully submits that the jury understood the meaning of "reasonable doubt" (twice reiterated by the court in instructions, and four times alluded to by defense counsel in closing argument), the state's burden of proving each element of the offenses, and the fact that reasonable doubt had to be generated by the evidence or lack of it. The district court found no error in the instructions.

ARGUMENT

V

THE EVIDENCE WAS SUFFICIENT TO CONVINCE A RATIONAL TRIER-OF-FACT OF GUILT BEYOND A REASONABLE DOUBT.

In Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), this Court established a new evidentiary standard for habeas corpus review:

> We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254--if the settled procedural prerequisites for such a claim have otherwise been satisfied--the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

443 U.S. at 324, 99 S.Ct. at 2792, 61 L.Ed.2d at 576-77 (footnote omitted). When one considers the testimony of Patrick Chandler, an accomplice, the fact that petitioner was driving the truck, that money was visible on the floor of the truck and the shotgun underneath the front seat, and petitioner's own statements to the police, it is absurd to contend that no rational trier of fact could find petitioner guilty beyond a reasonable doubt. Respondent submits that the evidence was more than sufficient under the standard announced in Jackson, and the district court agreed.

CONCLUSION

Respondent submits that there is no basis for granting certiorari. Every court, state or federal, that has considered petitioner's claims, has found them to be without merit. Therefore, this Court should deny certiorari.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

Jack Roberts

JACK ROBERTS
Assistant Attorney General

Attorneys for RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORVILLE GENE VINSON,
Petitioner,

v. No. 80-6732

ROBERT R. RAINES, Warden,
Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Submitted by:
Orville Gene Vinson, pprs se.
Box B-28054
Florence, Ariz. 85232

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THERE ARE NO CASES OR AUTHORITIES CITED.

JURISDICTION. 1

STATEMENT OF THE CASE AND REASONS FOR GRANTING THE WRIT.

Petitioner submitted his pro se PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on May 22, 1981, It was his best effort and even after reviewing the Respondent's RESPONSE TO PETITION FOR WRIT OF CERTIORARI, HE IS UNABLE TO CITE FURTHER authorities to bolster his case.

But petitioner takes the opportunity offered by this REPLY BRIEF to correct some of the erroneous facts and claims in respondent's RESPONSE. 1

CONCLUSION. 2

JURISDICTION.

Petitioner, Orville Gene Vinson, respectfully prays that a writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 23, 1981. On September 30, 1980, the U. S. District Court for the District of Arizona denied petitioner's APPLICATION FOR WRIT OF HABEAS CORPUS under 28 U.S.C. 2254. A timely and correct request for Certificate of Probable Cause was denied by both the U. S. District Court (in November 1980) and by the U. S. Court of Appeals for the 9th Circuit (on December 23, 1980). A timely MOTION FOR REHEARING was denied on February 23, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

STATEMENT OF THE CASE AND REASONS FOR GRANTING THE WRIT.

The facts of petitioner's case were set out in the section of his PETITION FOR WRIT OF CERTIORARI entitled, Statement of the Case.

None of those facts were refuted in respondent's RESPONSE TO PETITION FOR WRIT OF CERTIORARI. But the respondent alleged new facts that were not supported by the record.

On page 1 of respondent's RESPONSE, it was alleged that, "officers found . . . wads of bills in petitioner's pockets." The relevant testimony of arresting officer, Thomas Reyes, is found in Volume II of the Reporter's Transcript, pages 317 to 327. Officer Reyes testified that he found $8.50 in petitioner's left front pants pocket and $25.91 in his right front pants pocket. (Id., at 321). Officer Reyes eventually admitted that those monies were not wadded but were neatly folded. (Id., at 323). It was also established that petitioner had no wallet and that the monies found in his pockets was not stolen money from the robberies. (Id., at 330).

Also on page 1 of Respondent's RESPONSE it was alleged that, "Pat Chandler, petitioner's nephew and one of the actual participants, testified that petitioner suggested the robberies to obtain money for a payment on petitioner's truck. (Id., at 283-86)".

But Pat Chandler's further testimony shows that he refuted the claim that

petitioner suggested the robberies. (Id., at 286 to 290). Pat Chandler admitted that he did not know why he committed the 5 robberies. (Id., at 286). He admitted that he doesn't even remember all 5 robberies, only the 1st and the 4th ones, (Id., at 287 to 289), because he was "wasted" on marijuana, drugs and beer. (Id., at 288). He admitted that he pled guilty to all 5 robberies because his counsel told him to. (Id., at 299).

On page 4 of respondent's RESPONSE, the State claimed that petitioner was not "blacked-out" at the time of the robberies becuase, during the subsequent questioning at the pàlice station, petitioner said he knew nothing about the robberies, the money or the gun found in the truck.

> Page 4 of respondents RESPONSE.
>
> Moreover, several other statements made to Officer Marks make it evident that petitioner never "blacked out." Although Marks informed petitioner of the charges, there is nothing in the record to indicate that Marks mentioned anything about money on the floor of the truck or the shotgun discovered beneath the front seat. Nonetheless, petitioner told Marks that he knew nothing about the robberies, the money or the gun found in the truck. If petitioner had been unaware of what was going on during the robberies, he would have known nothing about the money or the shotgun.

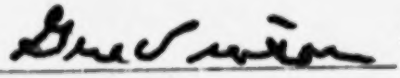
The record shows that petitioner was one of the 4 men who exited the truck in question. (Reporter's Transcript pages 179, 180). The police kept all of them alongside of the truck and searched them. (Id., at 179, 180). The police also searched the truck and found money and gun in question. (Id., at 180). Comments and questions were directed at petitioner and the other 3 men being held alongside of the truck regarding this money and gun. (Id., at 180). It's obvious that petitioner's knowledge of the money and gun could have been obtained without his having to participate in any robberies. Therefore, it is submitted that respondent's claim that, "If petitioner had been unaware of what was going on during the robberies, he would have known nothing about the money or the shotgun" is not supported by the record.

CONCLUSION.

Although every court so far has denied petitioner's claims, those courts have not said those claims are without merrit. Therefore, petitioner asks

that certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 23, 1981.

Respectfully submitted by,



Orville Gene Vinson, pro se.

A copy of this PETITIONER'S REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI was sent by 1st Class Mail on October 2, 1981, to:

ARIZONA ATTORNEY GENERAL
159 State Capitol Building
Phoenix, Ariz. 85007